

**SME Cement, Inc. and David Crowder and Robert G. Meadows, Cases 8-CA-15577(E) and 8-CA-15577-2(E)**

26 August 1983

**SUPPLEMENTAL DECISION AND ORDER**

**BY CHAIRMAN DOTSON AND MEMBERS JENKINS AND HUNTER**

On 28 March 1983 Administrative Law Judge William A. Gershuny issued the attached Decision in this proceeding. Thereafter, the Applicant, SME Cement, Inc., filed exceptions and a supporting brief, and the General Counsel filed a reply brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,<sup>1</sup> and conclusions of the Administrative Law Judge and to adopt his recommended Order.

<sup>1</sup> The Administrative Law Judge correctly stated, citing *Enerhaul, Inc.*, 263 NLRB 890 (1982), that, in actions to collect attorneys fees and expenses pursuant to the Equal Access to Justice Act, if the General Counsel's position in the underlying case was substantially justified, it is immaterial that the General Counsel may not have established a *prima facie* case of a violation. We note, however, that for the General Counsel's position to be substantially justified within the meaning of Sec. 102.144(a) of the Board's Rules and Regulations, Series 8, as amended, the General Counsel must present evidence which, if credited by the factfinder, would constitute a *prima facie* case of unlawful conduct by the respondent.

In this case, if the Administrative Law Judge had credited the testimony of Bill Crowder, he could have concluded that Crowder and his fellow employees had indicated to Respondent that they only refused to work overtime for one weekend, and therefore were not engaged in a partial or intermittent strike. Thus, the General Counsel would have established a *prima facie* case that Respondent's discharge of the employees violated the Act. *Polytech, Inc.*, 195 NLRB 695 (1972); *First National Bank of Omaha*, 171 NLRB 1145 (1968), *enfd.* 413 F.2d 921 (8th Cir. 1969). Additionally, if the Administrative Law Judge had credited testimony indicating that Respondent's president, Carlow, had stated that he planned to discharge Robert Meadows, Jr., because of his union activities, there would have been a *prima facie* case that Respondent's failure to recall Meadows from layoff was unlawful. Accordingly, we agree with

**ORDER**

It is hereby ordered that the application of the Applicant, SME Cement, Inc., Middlebranch, Ohio, for an award under the Equal Access to Justice Act be, and it hereby is, dismissed.

the Administrative Law Judge that the General Counsel's position with respect to both of these issues was substantially justified.

**DECISION AND ORDER**

Applicant, pursuant to the Equal Access to Justice Act, 5 U.S.C. 504, and the Board's implementing regulations, 29 CFR Part 102, seeks \$15,611 in fees and expenses for its defense of unfair labor practice complaints alleging the unlawful discharge of four employees and the failure to recall another. After 2 days of hearing, a decision was issued on January 7, 1983, dismissing each of the complaints. No exceptions were filed and, by Order of the Board dated February 8, 1983, the recommended Order of Dismissal became final.

Counsel for the General Counsel has moved to dismiss essentially on two grounds: one, that the applicant reveals a net worth in excess of \$5 million; the other that General Counsel's position throughout was substantially justified.

The financial statement reflects a negative net worth in excess of \$5 million, using the accepted accounting practice of indicating a negative value through the use of parentheses.

As to the second ground, however, the motion is well founded. Each of the cases turned ultimately on credibility issues, properly submitted by the General Counsel to an administrative law judge for determination. Even where, as here, there is a fundamental conflict in the testimony of the General Counsel's witnesses, it is uniquely the function of the factfinder, and not the General Counsel, to resolve those conflicts. Once that conflict was resolved, the cases came to an end. Where, as here, the General Counsel's position was substantially justified, it is immaterial that a *prima facie* case may not have been established. *Enerhaul, Inc.*, 263 NLRB 890 (1982).

It is therefore ordered that the Application for fees and expenses be, and the same hereby is, dismissed.